IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 138 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, a corp.,

Defendant-Respondent.

BRIEF FOR APPELLANT

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OPINIONS BELOW.

The opinion of the Supreme Court of Illinois, filed on January 17, 1945, is reported in 389 Ill. 466.

The opinion of the Appellate Court of Illinois, Third Division, was filed on June 30, 1944, and is reported in 323 Ill. App. 505.

STATEMENT WITH RESPECT TO JURISDICTION.

This proceeding was commenced by filing a petition for certiorari to review a final judgment of the Supreme Court of Illinois, entered on January 17, 1945, pursuant to the opinion of that court filed the same day. (P.R. 46.)

The jurisdiction of this Court is invoked under Rule 38, paragraph 5 (a) and section 1, Amendment XIV U. S. Constitution.

Section 13 (b)(1) of the Fair Labor Standards Act (Section 213 (b)(1), Title 29, U.S.C.A.) sets forth that the provisions of Section 7 of the Act dealing with maximum hours, and overtime compensation, under which this action was brought:

> "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935; * * *." (P.R. 3.)

Because of the defense interposed by respondent, the U. S. Motor Carrier Act was drawn in, (P.R. 5), the pertinent part of which is:

> "It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Trial was had without a jury in the Municipal Court of Chicago and judgment was rendered for petitioner based on specific findings of fact, among which was a finding

that petitioner worked 87 hours per workweek and that the major portion of petitioner's duties by him performed did not affect safety of operation within the meaning of the Labor Act. (P.R. 7.)

Respondent appealed to the Appellate Court of Illinois. It became necessary for that court to give utmost consideration to the interpretation of the Labor Act by Federal District Courts and the United States Supreme Court; to take into account interpretations of the Administrator of the Labor Act; place a proper construction on Section 204 (a)(1) and (2) of the Motor Carrier Act of 1935 and decisions of the Interstate Commerce Commission.

But the Appellate Court disregarded the foregoing and reversed the judgment on federal grounds, as clearly shown by its opinion stating as follows:

> "There is no question that some part of plaintiff's workweek was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders of his gang were exempt from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force plaintiff comes within the exemption for, if the loaders are exempt because the manner in which that work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff who planned and directed the loading affected that safety. Considering the purpose of the Motor Carrier Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial.
>
> We need consider no other point.
>
> It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law, and the judgment based thereon should be, and is, hereby reversed. * * *"

The Appellate Court erroneously asserted that the loaders in Petitioner's gang were exempt from section 7 and that therefore, with greater force, Petitioner came within the exemption. There was no issue, evidence, or finding in the trial court that the sole duties of those loaders was to load and unload and that they spent a substantial part of their time loading, as defined by the Interstate Commerce Commission in M.C.C. 28, 125 at 134. The Court's conclusion being based on this wrong premise, it follows that the conclusion itself is wrong.

That Court evolved a new theory in holding that the test of exemption applicability is whether an employee performs *any* duties rather than whether such duties are substantial. This theory is diametrically opposed to the prevailing Federal Acts, decisions and interpretations. The court thus thwarted and distorted the Labor Act to such an extent that, if allowed to become the law, all employees in the freight industry are at once deprived of Labor Act coverage because they may have occasionally lifted a package, or changed a label, or checked the damage to some parcel.

Petition for rehearing was denied. A certificate of importance was granted for appeal to the Illinois Supreme Court on the ground that this cause involves *questions of law of importance on account of principle and collateral interests.* (P.R. 27.)

Petitioner accordingly appealed to the Illinois Supreme Court which affirmed the decision of the Appellate Court on federal grounds. (P.R. 46.) The finding of fact of the trial Court that the major part of petitioner's duties did not affect safety of operation was not disturbed by the Appellate Court nor by the Supreme Court.

The determinant formulated by the Appellate Court was the only basis for the reversal of the trial court judg-

ment. The Supreme Court admitted this to be erroneous. Inasmuch, as this was the only theory upon which that decision was founded, the plain duty of the Supreme Court was to reverse the Appellate Court and affirm the trial court judgment.

The Supreme Court's decision states as follows (P.R. 52):

> "The Appellate Court found that the loaders in appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.
>
> "The substantial effect of the comment of the Appellate Court was to the effect that the quantity of petitioner's activities was not the true test of exemption from the Fair Labor Standards Act, yet said Court did hold appellant was in the same position as loader."

From the above it is evident that the Court based its decision on the Appellate Court's erroneous assertion that the loaders were exempt and therefore, Petitioner was exempt. This assertion, as stated before, had no basis in the trial record and the Supreme Court itself designates it as a comment. Moreover, it also appears that the Supreme Court infers that the substantial effect of the Appellate Court comment was that the quantity of petitioner's activities was not the true test of the exemption. This is clearly a misconception and leaves no room for inferences. It is limited and narrowed to their formula by their express words. They state in the decision: "We need consider no other point." The test or determinant formulated in said decision is that one who performs *any* duties in safety of operation is exempt from the benefits of the Labor Act. It is clear that both the Appellate and the Supreme Court decisions are founded on a misin-

terpretation of the Labor Act, as well as the Motor Carrier Act and pertinent decisions.

The Interstate Commerce Commission is vested by law with sole power to decide and rule with respect to employees over whom it asserts jurisdiction. Repeated demands have been made on that Commission to extend its jurisdiction over all motor carrier employees but it consistently refuses to do so. *U. S. v. Am. Trucking Ass'ns*, 310 U.S. 534. Under the above decisions no freight industry employee can sustain a claim to Labor Act coverage. Thus the decision in fact invades the province of the Commission's jurisdiction by inclusion of types of employees whom they consistently excluded by express refusal.

In *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 50, the basis of the suit was to recover freight charges, and involved clauses of the Uniform Bill of Lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate shipments. This Court held that the case presents a Federal question, the determination of which by a State Court is subject to its review, and a writ of certiorari was granted on the ground that interpretation of that Act under the circumstances of the case is a question of public importance.

In *Walton* v. *Southern Package Corporation*, 320 U. S. 540, plaintiff sued in the State Court under the Fair Labor Standard Act and recovered. The Mississippi Supreme Court reversed the judgment after which petition for certiorari was filed in the United States Supreme Court. The petition was granted by this Court and subsequently affirmed the judgment of the Trial Court for the reason that the petitioner there was found to be entitled to coverage under the Labor Act.

In *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, this Court ruled similarly on a petition for a writ of

certiorari in an action under the Federal Employers' Liability Act.

In *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, the writ issued to reverse an erroneous state court decision which was based upon misapplication of the Bankruptcy Act.

In *McCullough* v. *Smith*, 293 U. S. 228, the writ was granted to reverse an erroneous decision misapplying the World War Veterans' Act.

In *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143, the writ was granted where the state court, although purporting to apply the statutory tests of liability under the Federal Employers' Liability Act as established in prior Supreme Court decisions, has in fact permitted recovery upon proof insufficient to sustain a finding of negligence.

Sovereign Ry. Co. v. *Moore*, 284 U. S. 581, has in fact ignored or misapplied the statutory rule relating to assumption of risk.

Atchison T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458, has sustained a recovery without proof that the alleged negligence was the proximate cause of the injury.

In *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, its judgment fails to give effect to the established rules relating to injuries resulting from disobedience of rules or orders.

To the same effect are the cases of *St. Louis S. W. Ry. Co.* v. *Simpson*, 286 U. S. 346; *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313; and *same* v. *Dantzler*, 286 U. S. 318.

In *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 285, the writ issued to inquire whether the state court had rightly applied the regulations and the rules of the law of master and servant in determining whether a negligent worker

was the servant of the U. S. or of a railroad company at the time of the injury.

In *St Louis I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293, a refusal by a state court to give a federal statute or treaty the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the U. S.

Hopkins Fed. Sav. & Loan Assn. v. *Cleary*, 296 U. S. 315, 332.

Petitioner had no occasion to raise the question of due process in the trial court. Respondent succeeded in reversing the judgment on appeal. Petitioner then did raise the due process question in the Supreme Court of Illinois, which, under the circumstances, is to be considered timely. (P.R. 60-61.)

STATEMENT OF CASE.

On April 16, 1943, petitioner filed suit in the Municipal Court of Chicago, Illinois, against respondent Spector Motor Service, Inc. He sued under the Fair Labor Standards Act and alleged that respondent was a motor carrier in interstate commerce; that from October 1, 1939 to September 30, 1949, he was employed as a laborer, for which period no claim was made; that from October 1, 1940 and up to and including October 6, 1941, he was employed on a different basis at a salary of $150.00 per month, not as a laborer but to perform divers duties; that he worked 87 hours per week and was refused overtime pay. (P.R. 34.)

Respondent's defense was that its activities and those of *its employees are* under the specific jurisdiction of the Interstate Commerce Commission by reason of the U. S.

Motor Carrier Act of 1935; that *petitioner actually worked as a dockman, loader and dock foreman,* and his duties were directly connected with the safety of vehicles. (P.R. 5 and 6.)

Trial was had before that Court without a jury. The substantial effect of petitioner's testimony was that he was originally hired as a laborer; that for the period here involved, his status of employment was changed to that of a checker and to perform other fluctuating duties (P. R. 10); that he worked 87 hours per week (P. R. 12); that he had charge of hiring and had to call the Union for help; that he had charge of keeping the payroll down to a minimum; that he marked bills and brought them into the office of the rate clerk to be billed (P.R. 11); that the amount of time he put in on local freight would be in spurts, and would amount to quite a few hours; that with reference to incoming freight, he used to check the loads and have it unloaded in the terminal and the same operation was used in putting it in separate sections where it belonged; that about one-half day's work was consumed in the work of unloading; that outbound freight was done mostly at night, beginning on an average about 4:00 or 5:00 P.M.; that he had to stay there until the night foreman came in about 7:00 or 8:00 P.M. to give him instructions (P.R. 12); that it was his business to see that men he hired get an application, a time card, social security card, to see that they punched their card on time when they started and get through at noon time, etc.; when a man wanted to quit, it was up to him to O.K his time card and see that the young lady makes a draft for his pay; that he had to watch in case a man was off to see that his time card was marked accordingly; that the work on time cards for day and night men was done every day and on week-ends, and consumed quite a few hours daily (P.R. 11); that he had

nothing to do with carrying packages into the trucks on outbound freight (P.R. 11); that he used to attend staff meetings which would last about two or three hours; that he had to confer with the auditor a couple of times a week on account of the payroll (P.R. 11); that he had to watch that bills were made out right; that sometimes there were mistakes in the weight of freight pieces; that if that happened he had to go to the proper parties to correct it (P.R. 12); that after the terminal manager hired lease operators, he turned them over to petitioner to make out an application and then have the terminal manager approve it (P.R. 12); that there is a lot of checking to be done to see that packages are not pilfered; that if anything is wrong an OSD is made out (P.R. 13); that he had to supervise all packages taken off from trucks, and see that they were sorted, piled and placed according to different and proper sections in the terminal so they did not fall and hurt somebody or break up the package (P.R. 13); that he did not have charge of very much loading and that such loading was done by the night men (P.R. 11, 12); that to a certain extent a checker watches the loading of the truck and the distribution of the weight in the truck so that heavy machinery pieces are placed in the bottom and balloon pieces on top. (P.R. 13, 14.)

Thereafter, special findings of fact were entered by that Court, one of the findings, being that the major portion of petitioner's duties did not affect safety of operation. Judgment was rendered against respondent in the sum of $1,149.88 and court costs, including liquidated damages and attorney's fees. (P.R. 6.)

Respondent appealed to the Appellate Court of Illinois. That Court reversed the trial court judgment on the theory that, as a matter of law, if petitioner "performed any" work affecting safety of operation it is sufficient to de-

privq him of coverage under the Fair Labor Standards Act.

Petitioner appealed to the Illinois Supreme Court. In due time, L. Metcalf Walling, Administrator of the Wage and Hour Division of the Department of Labor, moved for leave to file a brief as *amicus curiae*. (P.R. 41.)

In his suggestions in support of the motion, he stated that his interest is that of the public expressed in remedial statute of great importance designed to eliminate sub-standard labor conditions; that the responsibility of administering the Act is placed upon him; that he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act; that this appeal involves the interpretations of Section 204 (a)(1) and (2) of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act; that the decision will affect thousands of employees of motor carriers throughout Illinois and the United States; that his brief will concern the issue whether a "motor carrier employee who performs any duties" in safety of operation of motor vehicles is exempt from the overtime provision; that this is of first impression in Illinois, and that this point had not been decided by the United States or any United States Court of Appeals. The Court denied the motion of L. Metcalf Walling and affirmed the Appellate Court decision.

Petitioner filed in due time a petition for rehearing, which the Supreme Court denied on March 19, 1945. (P.R. 63.)

SPECIFICATIONS OF ERRORS.

The Illinois Supreme Court erred in attempting to broaden the jurisdiction of the Interstate Commerce Commission inasmuch as the Commission, having sole power to do so, limited its jurisdiction to (1) mechanics and other garage workers, (2) loaders, (3) drivers, and (4) drivers' helpers.

The Illinois Supreme Court erred in disregarding the Labor administrator's interpretation and Federal decisions to the effect that all other employees are clearly not within the exemption.

The Illinois Supreme Court erred in its failure to hold that petitioner was a checker and performed more than 50% non-exempt duties and was therefore not in any of the classes of employee under whom the Commission asserted jurisdiction.

The Illinois Supreme Court erred in disregarding the special findings of the trial court that the major portion of petitioner's duties did not affect safety of operation of motor vehicles, and in reversing the judgment based on such finding.

The Illinois Supreme Court and the Appellate Court erred in assuming that petitioner was in the position of a loader because there is no evidence in the record that he was a loader and the testimony shows that he worked as a checker and performed fluctuating duties.

The Illinois Supreme Court erred in basing its affirmance on a mere Appellate Court comment that the loaders in petitioner's gang were exempt from the Labor Act when in fact no issue was presented and no evidence heard as to the status of such loaders.

SUMMARY OF ARGUMENT.

(A) Where, as here, petitioner was employed as a checker and to perform fluctuating duties, and more than 50% of his workweek was spent in performing such duties which did not directly affect safety of operation of motor vehicles, he is entitled to coverage under the Labor Act.

(B) A reviewing court's decision cannot be based on a guess or surmise and where, as here, it does not appear that the trial court found that petitioner's sole duties were to load and unload and that he spent a substantial part of his workweek in the performance of such duties, it was erroneous to reverse a judgment in his favor and deprive him of the benefits of the Labor Act.

Bechtel v. *Stillwater Milling Co.*, 33 F. Supp. 1010.

Crean v. *Moran Transportation Co.*, 57 F. Supp. 212.

Faulkner v. *Little Rock Furniture Co.*, 32 F. Supp. 590.

Kasofsky v. *Champion Trucking Co.*, 181 Miss. 470.

Robbins v. *Zabarsky*, 44 F. Supp. 867.

Tineralla, et al. v. *Des Moines Transportation Co.*, 41 F. Supp. 798.

Zenith Radio Dist. Corp. v. *Mateer*, 311 Ill. App. 263.

Overnight Motor Transportation Co. Inc. v. *Missel*, 316 U. S. 572.

McKeown v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521.

Anuchick v. *Transportation Freight Co.*, 6 Labor Cases, 61,245.

Keegan et al. v. *Ruppert et al.*, 7 Labor Cases, 61,726.

Ralph Knight Inc. v. *Mantel*, 7 Labor Cases, 61,591.

U. S. v. *American Trucking Associations*, 310 U.S. 546.

ARGUMENT.

The trial Court found in the instant case, as a matter of fact, that plaintiff worked 87 hours during each week and was not paid for overtime, which was in violation of Section 7(a) of the Labor Act. Most important of all, the trial Court found specifically that the major portion of petitioner's work did not affect safety of defendant's operation within the meaning of Section 13(b) of the Act, and was not exempt under said Section. That finding was never disturbed by either of the appellate tribunals. It is the basis upon which judgment was rendered.

It is possible to gather sentences, or portions thereof, from the testimony in the record to show that petitioner performed *some* duties affecting safety of operation. But that is immaterial. Petitioner never contended not having performed some duties that affected such safety. However, it is contended that this was but to a minor extent.

It is even possible to show that one witness stated one thing or another which is different than what petitioner testified to. But the trial judge heard the witnesses, considered their interests, saw their demeanor, and judged accordingly. Neither the Illinois Appellate nor Supreme Court attacked or impaired that judge's findings as not being based on sufficient evidence. Neither decision disturbs the finding that the duties which he performed were numerous and of a wide variety and that the major portion of his work for the period sued did not affect safety of operation of motor vehicles within the meaning of the appropriate sections. (P.R. 7.)

A number of cases have already been adjudicated against interstate freight employees who sought the benefits

of the Labor Act. These decisions are always cited by interstate shippers who habitually resist claims for labor act coverage. No doubt many of these cases may be brought into discussion here. At first glance they may appear relevant. In reality they have no application whatsoever.

For example: in *Bechtel* v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010, plaintiffs alleged they were truck drivers.

In *Epps* v. *Wheathers*, 49 F. Supp. 2 plaintiffs were drivers of trucks or helpers or loaders who crate, pack and load or unload trucks.

In *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp. 590, plaintiff was truck driver or driver's helper.

In *Tineralla et al.* v. *Des Moines Transportation Co., Inc.*, 41 Fed. Supp. 798, plaintiff alleged he was a truck driver.

Kasofsky v. *Champion Trucking Co., Inc.*, 181 Misc. 470, the court stated:

> "had plaintiff's duties been only as he claimed and testified to, he would have been entitled to the benefits of the Fair Labor Standards Act. However, it seems to me that the fair preponderance of the evidence clearly shows that plaintiff was an experienced driver's helper and loader. He devoted a substantial part of his time to the excercise of such duties."

This case is directly contrary to the case at bar in that the trial court specifically found that the plaintiff's duties affected safety of operation.

In *Robbins* v. *Zabarsky*, 44 Fed. Supp. 867, plaintiff alleged he was employed to repair and service trucks. He also alleged he was foreman of Mechanics but the Court stated his allegation of the nature of his duties was sufficient to show he was exempt. It is not necessary to determine the effect of his allegation of being a foreman.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, the trial Court *found* that the "Checkers", "Callers", and "Wheelers" all devote a *substantial* amount of their time to safety of vehicle operations, the checkers were employed as checkers only, and not to perform a wide range of fluctuating duties, and it appeared in that case that in their Union contract with defendant, plaintiffs, including checkers, were all termed *dockmen*. This case is entirely different than the case at bar in that petitioner performed fluctuating duties, and there was no Union contract terming petitioner a *dockman* and the trial Court did not find that petitioner devoted a substantial time to checking, but on the contrary, entered a special finding that the major portions of his duties did not affect safety of operation, and was, therefore, entitled to the benefits of the Labor Act.

Nearly all of the above cases are vulnerable to a motion to dismiss because it appears on the face of the complaint that plaintiffs are either drivers, drivers' helpers, loaders or mechanics. They are plainly within either one of the four classes of employees subject to the Commission's jurisdiction.

But the controlling cases are those which involve fluctuating duties of employees and those cases where less than a substantial amount of work is performed by claimants directly affecting safety of operation of motor vehicles.

We believe the crucial decision to be the case of *United States* v. *American Trucking Associations*, 310 U. S. 546. Many illuminating points are contained therein. It is there held that Congress did not intend that all freight employees be held exempt. On the contrary, only the employee *directly engaged in the operation of the motor vehicle* may be considered as exempt. This was a fore-

runner to *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572. The plaintiff in that case was a rate clerk and performed other fluctuating duties. Under the decision of this Court, Missel was accorded the benefits of the Labor Act. This decision became the criterion for similar cases. It established the principle that an interstate freight employee may perform some duties in safety of operation and yet not necessarily be deprived of the Labor Act benefits. Federal District Courts then rendered decisions accordingly.

In *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521, involved a checker of freight who also frequently assisted in loading and unloading and was allowed to recover. The situation is in all respects similar to the instant case because petitioner, too, was a checker and performed other duties. We think this case was not given adequate consideration at all by the reviewing Courts or Respondent.

In *Aruchick* v. *Transportation Freight Co.*, 6 Labor Cases, plaintiffs were mechanics who, as a class, were specifically under the jurisdiction of the Interstate Commerce Commission. Yet, on their showing that a *substantial* part of their duties were performed in *non-exempt* work, they were allowed to recover. It was there stated:

> *"Technically there isn't any employee of a transportation company that isn't indirectly doing work affecting safety of operation but we believe the Interstate Commerce Commission had a definite thought in mind in rendering its decision.*
>
> "In our interpretation of the theory and reasoning of the Interstate Commerce Commission as set forth in its decision of March 1941—and in fact if there is to be a division in category of defendant's employees—it is evident that all plaintiffs here (2830) are concerned with the safety and size of car and that any activity affecting 'safety of operation' is

incidental. We therefore hold that these plaintiffs are not subject to the rules and regulations of the Interstate Commerce Commission affecting their qualifications and maximum hours of service. Such we believe to be the interpretation of their own powers by the men who know." (Emphasis ours.)

Keegan et al. v. *Ruppert et al.*, 7 Labor Cases, 61,726, involved a garage worker who oiled, greased, gassed and washed interstate motor vehicles. Defendant contended that he was a mechanic specifically exempt from the Act, but, upon showing that his duties did not *directly* affect safety of operation, he was allowed to recover.

In *Ralph Knight Inc.* v. *Mantel*, 7 Labor Cases, 61,591, plaintiff was allowed to recover, and the Court stated that the Act must be liberally construed to effect its purpose; that all employees in interstate commerce, so far as is reasonably possible, should be made subject to the provisions of the Labor Act; that exemptions would tend to defeat its purpose, and therefore such exemptions should be strictly construed.

The decision in 28 M.C.C. holds that the Interstate Commerce Commission emphasized its unwillingness to include many classes of freight employees. At page 135 it is shown that many carriers employ men whose sole duties are those of a dispatcher; that by an error in judgment they may assign a vehicle of insufficient size and weight-carrying capacity to transport the load or cause a driver to duty who is sick, fatigued or otherwise not in condition to operate the vehicle or requires or permits the vehicle to depart when the roads are icy and the country to be traversed is hilly, an accident may result. Yet, the Commission held that dispatchers are not considered under their jurisdiction.

The Appellate Court failed to adhere to the foregoing cases and evolved a new theory of law. It held the true

determinant is whether an employee performs "any" duties which substantially affect safety of operation, rather than whether the duties affecting safety of operation, are substantial. This theory was volunteered by that Court. It was not urged by respondent. Respondent's position was that all its employees are exempt and that petitioner was actually working as a dockman, loader and dock foreman (P.R. 5), or in the alternative that he was an executive. These defenses relate to exemptions and therefore it was incumbent upon respondent to sustain the burden of proof.

That decision would tend to thwart and narrow the far reaches of the Labor Act and tend to deprive thousands upon thousands of employees, engaged in the interstate motor carrier industry, of its benefits. Therefore, the Labor Administrator sought to file a brief as *amicus curiae* on the question: May an employee who performs "any" duties which affect safety of operation of motor vehicles be exempt from the overtime provisions of Section 7 (a) of the Labor Act by virtue of Section 13(b)(1) thereof? He further stated that the point involved is one of first impression, and has never before been decided or presented to that Court or to the United States Circuit Court of Appeals or to the Supreme Court of the United States. But his motion to file such a brief was denied.

The United States and Federal District Courts regard the Labor Administrator's interpretations of its provisions with great weight. The following portion from his Interpretative Bulletin No. 9 was cited:

> "It should be noted that any truck driver, drivers' helpers, mechanic or loader employed by a common, contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities, such as producing, processing or manufacturing goods, *warehouse or clerical work, or other*

> *type of work which does not affect safety of operations* is not within the scope of the exemption contained in Sec. 13(b)(1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption." (Emphasis ours.)

The Illinois Supreme Court held the true determinant or test is whether the duties affecting safety of operation were *substantial* and not whether petitioner performed *any* or *some* duties. If that Court's pronouncement of the true determinant or test is correct, then the decision of the Appellate Court was not justified and should have been, of necessity, reversed and the judgment of the trial Court affirmed because there was no adjudication in the record that petitioner's duties in direct safety of operation of motor vehicles were *substantial*. On the contrary, the trial Court found petitioner's duties were numerous and that the *major* portion of petitioner's duties did *not* affect safety of operation. This means that the duties affecting safety were in fact not substantial. It is thus clear that the determinant or test formulated by the Supreme Court is erroneous first as a determinant and second as applied in the instant case. It should be remembered that respondent failed to meet the burden of proving that petitioner was a *loader whose sole duties were to load and unload and that he spent a substantial part of his workweek in such duties*. The trial Court's specific finding makes it clear that more than 50% of plaintiff's duties did not relate to safety of operation. Conversely, it can be said that only some fraction of duties was performed in such safety. The Appellate Court of Illinois, in *Zenith Radio Distributing Corp.* v.

Mateer, 311 Ill. App. 263, has defined the meaning of the word "major" as follows:

> "The word 'major', as used in Bulk Sales Act, which requires compliance with the Act in the case of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger."

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

Under the pertinent Illinois statute the Appellate Court may make a finding of fact different from the trial court. If such finding is made it ends the case and the Illinois Supreme Court is without jurisdiction to review the decision. In the instant case however, the Appellate Court made no finding of fact different than the trial court. It expressly states that its decision is made "as a matter of law." It granted a certificate of importance to review its decision "because it involves questions of law of importance on account of principal and collateral interests." It said:

> "It is our opinion that the finding that plaintiff is not exempted is erroneous as a matter of law. . . ."

A finding of fact means what it says. Nowhere in the opinion does it appear that the trial Court's finding is not based on sufficient evidence or find the facts to be different. The Appellate Court simply and plainly held that the trial Court did not correctly apply the law. The fact that the Illinois Supreme Court did review the judgment is sufficient to indicate that the whole case revolves around the questions of law and not questions of fact.

It is respectfully submitted that this case is of great public interest and importance. It involves the question

of the distortion, misapplication and disturbance of unanimity of Federal decisions and interpretations of the pertinent sections of the Labor and Motor Carrier Acts. This case therefore merits consideration of this Court to the end that the distortion and misapplication be rectified and the decision of the Illinois Supreme Court reversed and the judgment of the trial Court affirmed.

Respectfully submitted,

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